United States Court of Appeals

for the Second Circuit

APPENDIX

75-7495

United States Court of Appeals

FOR THE SECOND CIRCUIT

COSMO RUGGIERO,

Plaintiff-Appellee,

—against—

KONINKLIJKE NEDERLANDSCHE
STOOMBOOT MAATSCHAPPIJ N.V.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civil 4015 KTD

COSMO RUGGIERO,

Plaintiff,

—against—

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ N.V.,

Defendant.

9/20/72	Filed complaint and issued summons
7/ 1/75	Before DUFFY, J. jury trial begun
7/ 2/75	Trial cont'd and concluded. Jury verdict for pltff. in am't. of $31,063
7/ 3/75	Filed judgment no. 75,585—ordered that pltff. have judgment against deft. in am't. of $31,063
7/11/75	Filed deft's post-trial motions
7/29/75	Filed Memo endorsed on motion—Motion denied. So ordered—DUFFY, J.
8/26/75	Filed deft's notice of appeal

Trial Transcript Excerpts

* * * * *

[1]

Before:

HON. THOMAS KEVIN DUFFY,
District Judge.

Appearances:

ZIMMERMAN & ZIMMERMAN, Esqs.
Attorneys for Plaintiff

By: JAMES DAVID AUSLANDER, Esq.,
Of Counsel

BURLINGHAM, UNDERWOOD & LORD
Attorneys for Defendant

By: WILLIAM M. KIMBALL, Esq.,
Of Counsel

* * * * *

JURY SELECTION

* * * * *

[3] * * * * *

The Court: Mr. Lauricella, you're right at the turn-off on the Hutchison River Parkway onto Mill Road in Eastchester, is that correct?

Juror #1: Right.

The Court: I only live about ten blocks from there so that's why I know.

* * * * *

Court's Interrogation of Jury

[4] * * * * *

The Court: Where was the last place you taught?

Juror #1: Mount Vernon system.

The Court: That's right down California Road from your house?

Juror #1: Right.

The Court: Boy, nice and close to home.

Juror #1: It was.

* * * * *

[5] * * * * *

The Court: What kind of work do you do?

Juror #2: I am a mechanical engineer. I work for the Sloan Kettering Institute.

The Court: Sloan Kettering Institute?

Juror #2: Yes.

The Court: Did you get that, gentlemen? That is the big—

Juror #2: Cancer center uptown.

* * * * *

[6] * * * * *

The Court: Miss Lindenauer, how do you pronounce your first name?

Juror #3: Siran.

The Court: You live up in the Inwood section of Manhattan, is that correct?

Juror #3: Yes.

The Court: Almost up by Baker Field?

Juror #3: Yes.

The Court: Close?

Juror #3: One block.

Court's Interrogation of Jury

The Court: I thought maybe you could lean out your window and see the football games; can you?

Juror #3: From the roof.

* * * * *

[7] * * * * *

The Court: Have you been on a jury before with me?

Juror #5: Well, I have been up in the jury box.

[8] The Court: I had a feeling that I saw you once or twice before.

* * * * *

[9] * * * * *

The Court: Mr. Carrington.

Alternate #1: Yes.

The Court: You had a long trip this morning.

Alternate #1: Almost every morning.

The Court: Mr. Carrington comes from Wingdale, New York, which is a delightful little village way up in Putnam County, is that correct?

Alternate #1: Dutchess County.

The Court: Even farther up north than I thought it was. My recollection is Bloomingdale, New York, and check me if I am wrong, if you would, please, sir, is a big state hospital there, and there is a thing called the Ten Mile River?

Alternate #1: Right.

The Court: A Boy Scout Camp there?

Alternate #1: Yes, right.

The Court: It shows you how long ago I was there.

* * * * *

Court's Interrogation of Jury

[10] * * * * *

Mr. Neumann. I give up. I admit some knowledge of the places in the Southern District, but where Wap Falls is—

Alternate #2: Wappinger Falls.

The Court: The problem is they produce this from a computer map and everything is cut down. Wappinger Falls, I know that. Do you know where that is, gentlemen? I have got one head shaking yes and the other one—tell us where it is, so they both know where it is.

* * * * *

[22] * * * * *

The Court: Mr. Steembach, you are from Broom Street down here in New York, right?

Juror #5: Yes, sir.

The Court: Do you remember when fighters used to be introduced as "the man from New York's lower east side"?

Juror #5: No. I didn't live down there then. I probably wasn't interested.

The Court: You used to live up in the Bronx?

Juror #5: Right.

The Court: You and I have seen each other before.

Juror #5: Yes, the other day.

* * * * *

[23] * * * * *

The Court: How long have you lived in Broom Street?

Juror #5: Since November, six months.

The Court: Prior to that you used to live up in the Bronx, right?

Juror #5: Right.

The Court: What part of the Bronx?

Juror #5: Near NYU, West Bronx.

The Court: University Avenue, someplace up there?

Juror #5: Burnside, yes.

The Court: I remember.

Juror #5: I know you do.

* * * * *

* * * * *

[25]

The Court: You came from Parkview Drive in [26] Bronxville, is that correct?

Juror #2: It is really Eastchester.

The Court: That's where I live. Have you lived there for the last five years, sir?

Juror #2: Twenty-five years.

The Court: Where is Parkview Drive?

Juror #2: It runs parallel with the Hutchison River Parkway off New Rochelle Road, Chester Heights.

The Court: That's down by that great bakery, isn't it?

Juror #2: Very good. Very fattening.

The Court: Very fattening, lord knows. I should go on a diet. That bakery makes those great bushy cream things. I'm sorry I even started thinking about it.

* * * * *

* * * * *

[28]

The Court: How about you, ma'am? I assume you never worked aboard a ship.

Juror #1: No.

The Court: Have you ever been on one?

Juror #1: To see somebody off, but that's it.

Court's Interrogation of Jury

The Court: I'm quite sure you hated it when they said all ashore that's going ashore.

Juror #1: Right.

The Court: I get that feeling myself.

* * * * *

[33] * * * * *

The Court: Ladies and gentlemen, at this point those of you who are nicotine addicts have not had a cigarette for approximately an hour and twenty minutes. Under the circumstances, we are going to take a break. The clerk will show you where the jury room is. The jury room will be locked. Neither the clerk nor I will guarantee [34] that anything you leave in there will remain there, okay? Sorry. Somebody stole one of the judge's robes a couple of weeks ago. What they are going to use it for, I don't know.

Juror #1: Halloween.

The Court: Thanks a lot. That is about the best suggestion that we have had yet.

* * * * *

[35] * * * * *

The Court: The hours of this particular Court are different from sixty other courts around this area. We start at 10 o'clock in the morning. We break at 12:30 for lunch. Everybody else lets their juries go at 1 o'clock, which causes the greatest traffic jam in the restaurants around here that you can ever find. I personally hate to wait on lines and I assume that you do, too. As I said, we will go from 10 o'clock in the morning until 12:30 and from 2 o'clock in the afternoon. I figure that the extra half hour will get you time to find a restaurant. I don't recommend any of

them in this neighborhood, but maybe you would like to go over to Chinatown and the extra half hour would be sufficient for that.

• • • • •

[1] VINCENZO GENTILE, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Auslander:

• • • • •
• • • • •

[10] Q. When the cars were picked up off the deck and brought down into the hatch, did you see anything on the deck?

• • • • •

A. Yes. I saw some spot of grease, oil where the car landed, underneath the car where it landed on deck.

Q. When you saw that grease or oil or whatever it was, did you have another conversation with the mate? A. Yes, sir.

Q. What did you say to him and what did he say to you? A. I tell him to put something, because I walk over here, to throw on the oil or grease or whatever it was, that is what he does. He calls somebody, the crew, he bring some sand or sawdust and throw on the oil or whatever it is.

Q. Now, did you see an accident happen to Mr. Ruggiero?

• • • • •

A. Yes, sir.

Vincenzo Gentile—for Plaintiff—Cross
Cosmo Ruggiero—Plaintiff—Direct

[12] *Cross-Examination by Mr. Kimball:*

* * * * *

[19] * * * * *

Q. Tell me, when they brought the cars up from the dock and put them on the deck, did they also land the cars in the same place each time? A. Yes, sir.

Q. They didn't change the booms? A. No.

Q. So that means every time when they brought those cars up the cars landed in the same place? A. Yes, sir.

Q. After three or four times you saw some spots on the deck? A. Yes, sir.

Q. You asked somebody to put something on them? A. Yes, sir.

* * * * *

[22] * * * * *

Q. Did you ask for some salt or sawdust or sand, did you ask for that before or after you saw Mr. Ruggiero slip? A. After.

Q. After. Did you see the spots on the deck before or after you saw Mr. Ruggiero slip? A. After.

* * * * *

[23] Cosmo Ruggiero, the plaintiff, called as a witness in his own behalf, having first been duly sworn, testified as follows:

Direct Examination by Mr. Auslander:

* * * * *

[29] * * * * *

Q. Before you pushed the car over, was there anything that had to be done to adjust the flooring where the car

was going to go? A. Yes, we checked the floor to make sure that the plywood or dunnage, whatever we used, is straight on the floor. This way when we push the car it don't slide from underneath and somebody get hit in the legs with it.

Q. When you were checking the flooring where you were going to put it, was the car resting in one spot for any period of time? A. Yes, until we straightened the other car out.

[30] Q. How long was it resting there? A. About three or four minutes.

Q. And then did you get behind the car and start to push it forward again? A. Yes.

Q. Tell us what happened? A. We tried to put our hands underneath the rear bumper and somebody count in cadence one, two, three, and we try to bounce it and push it over in place.

Q. What happened at that time? A. My left foot gave way and I fell on my arm and shoulder.

Q. What did your left foot give way on or why did it give way? A. I slipped on oil or grease.

* * * * *

[32] * * * * *

Q. Mr. Ruggiero, so that after the accident you noticed something on your shoe. How soon after the accident did you notice whatever was on your shoe was there? [33] A. When I got up and start walking around.

Q. What, if anything, did you notice on your shoe? A. Grease or oil.

* * * * *

Cosmo Ruggiero—Plaintiff—Cross

[44] • • • • •

Cross-Examination by Mr. Kimball:

• • • • •

[50] • • • • •

Q. Do you recall giving these answers to these questions, Page 5, Line 4, deposition taken December 15, 1972, signed and sworn to by you before a notary on January 10, 1973, original of which is filed with the Court.

"Question: Where did the grease or oil come from?

[51] "Answer: It was on the plywood that was sent down.

"Question: When did you see it for the first time?

"Answer: When I fell on it, I mean I slipped on it."

Do you recall that? A. I remember.

Q. So, in other words, the first time you saw it was after you slipped? A. Correct.

• • • • •

[53] • • • • •

Q. Did you ever look at the place where you say you slipped? A. Yes, sir.

[54] Q. Before or after you slipped? A. After.

Q. Do you recall this answer to this question, Page 36, Line 20:

"Question: But the particular place where you slipped, did you look at it at that very spot after you fell?

"Answer: No, sir."

You read English, don't you? A. I read English.

• • • • •

Q. Anybody else beside you slip or fall while bouncing that Chevy? A. No, sir.

• • • • •

[58] • • • • •

Q. You continued working that Friday until about 5:00 or so, is that correct? A. That is correct, sir.

Q. You didn't slip or fall again that day, did you? A. No, sir.

[64] • • • • •

Redirect Examination by Mr. Auslander:

• • • • •

[65] • • • • •

Q. Did you look at your shoe? A. Not right away, sir.

Q. When did you look at your shoe? A. First I looked at my arm.

Q. Yes. A. And then later on I felt something greasy, slippery under my foot and then I looked and I saw what it was, oil or grease, and then I went over and got a piece of burlap and I wiped it.

• • • • •

[68] • • • • •

EDWIN CAMPBELL, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Auslander:

• • • • •

[71] • • • • •

Q. Now, did my office ask you to examine for us Mr. Ruggiero and render a report and be prepared to come to court to testify as to the type of injury he had, whatever condition you may have found and the like? Did we ask you to do that for us? A. Yes.

Q. When did you examine Mr. Ruggiero for this? A. On June 26, 1975.

Q. Doctor, as a matter of fact, it was June 25, the second line. A. I am sorry, the report is dated June 26.

• • • • •

[72] • • • • •

The Court: Did you or did you not get a history as to what his accident might be?

The Witness: Yes, sir.

The Court: Yes, sir, you did what?

The Witness: I did get a history from him.

Q. Would you please tell us what that history was?

Mr. Kimball: Objection. It has been conceded during opening this was not a treating physician. He was merely an examining doctor.

The Court: Go ahead, Doctor, and tell us.

The objection is overruled.

A. He gave a history of having sustained injury to the left shoulder and left arm on April 17, 1970, while helping to push a car on the ship he slipped on oil or greasy [73] substance on board floor and fell, striking the left arm and shoulder.

* * * * *

[93] * * * * *

Cross-Examination by Mr. Kimball:

* * * * *

[97] * * * * *

(Defendant's Exhibit B marked for identification.)

* * * * *

Q. Do you recognize the piece of paper, is that one of the kinds of official reports which doctors sometimes file with the Department? A. Yes, that is an attending physician's report.

Q. Attending physician's initial report? A. That is correct.

Q. Does it contain a history which the person gave to the attending physician? A. Yes.

* * * * *

[99] * * * * *

(Defendant's Exhibit B received in evidence.)

Mr. Kimball: May I read the history, your Honor?

The Court: Sure.

Mr. Kimball: Item No. 18: "Employee's account of how injury or exposure to occupational disease occurred."

"Answer: Foot of 39th Street. Working on loading ship in hold of Hatch No. 2 aft. While pushing vehicle into place, felt a sharp pain in left shoulder and entire arm. Now complains of induration and discoloration of entire left forearm volar aspect, with pains in shoulder region."

* * * * *

Q. You got a history about slipping and falling and striking the left arm and shoulder, didn't you? A. Yes.

Q. That is not the history I read you, is it? A. That is not, no.

* * * * *

[111] JOHN W. AUGER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Kimball:

* * * *

[114] * * * * *

Q. I show you a piece of paper which has been marked A for identification and ask you whether or not you can identify it? A. Yes, sir.

The Court: Do you know what it is?

The Witness: Yes, sir.

The Court: What is it? That is what he is asking you.

[115] A. The foreman's report of accident and investigation.

Q. Do you know who prepared it? A. I prepared it.

John W. Auger—for Defendant—Direct

Q. Does your signature appear on there? A. That is right.

* * * * *

Q. Was it your job as timekeeper to prepare that report? A. That is part of my job, yes, sir.

Q. Did you prepare that report in the performance of your job as timekeeper? A. I did.

* * * * *

[117] * * * * *

(Defendant's Exhibit A received in evidence.)

Mr. Kimball: May I read portions of A to the jury, your Honor?

The Court: Yes, it is in evidence.

* * * * *

[118] * * * * *

"Describe accident fully: While stowing a car in place, I was picking up the rear of the car to bounce it into place when I felt a pain in the left forearm. "Man told the hatch boss, but he did not wish to go to the doctor at the time of the accident thinking it was a charley horse and would work out.

"Signed C. Ruggiero."

* * * * *

[131] * * * * *

Mr. Kimball: The defendant moves to dismiss the negligence claim.

The Court: Motion denied.

Mr. Kimball: On specific ground of failure of notice, reminding the Court that the witness Gentile testified that he saw spots on the main deck after

plaintiff's accident. That is the only evidence of actual notice to the defendant. [132] There is no evidence of constructive notice.

The Court: Motion denied.

Mr. Kimball: Exception.

Defendant moves for a directed verdict on the unseaworthiness claim for failure of proof that the vessel was less than reasonably fit for her intended purpose and also for failure to prove the Pinto requirement that this vessel was less fit for service than similar vessels in similar service. Also on authority of the Wiseman case because the testimony is that developed on redirect examination excruciatingly that some time after the plaintiff claims to have picked himself up from his fictional fall, he walked around a while and then he felt something on his shoe and he looked at it and it turned out to be grease or oil.

The Court: All right, motion denied. Anything else?

Mr. Kimball: Exception.

* * * * *

[155] * * * * *

SUMMATION BY MR. AUSLANDER

We are claiming that there were drops, a dime, a quarter, half dollar size, but enough to cause you to fall and that little bit is sufficient, because the slightest bit of negligence, the slightest bit, makes the defendant responsible.

* * * * *

[158] * * * * *

(Jury left the courtroom.)

Mr. Kimball: If your Honor please, I wish to respectfully except to your having factually and I think judicially erroneously admonished me for taking exception to my adversary reading from portions of the deposition which patently were never in evidence, by telling me erroneously that the part that I read to the jury was not in evidence, which it is, and saying it to me so fast and in such a rude and cutting and peremptory manner as to be indicative of judicial animosity toward me which I dislike, but it professionally doesn't concern me, but it's got to hurt my client [159] when a judge reacts that way. Now, if you had been right, if I had ignored my responsibilities to the Court and willfully gone outside of the record to read something to this jury, you would be perfectly—

The Court: You were all over outside of the record. That was clear. It is also clear that there is a doctrine in the law which is called fair reply and that is exactly what was going on.

* * * * *

[161] * * * * *

The Clerk: The Court is about to charge the jury. Any spectators desiring to leave the courtroom will do so now or remain seated until the completion of the charge.

The Court: Ladies and gentlemen, we have now reached the concluding phase of the trial. At the outset, let me express my thanks for your faithful attendance, patience and close attention to this case.

Charge of the Court

You have heard and seen all of the evidence upon which this case is to be decided. Through the arguments of the respective counsel, you have learned conclusions which each party believes should be drawn from the evidence presented to you.

The instructions, which I am about to give, it is my function to outline the principles of law which shall be the guide to your deliberations. It is your duty, as I outline the law, for you to follow that.

You are to accept the instructions on the law as they are given by me whether you agree with them or not.

[162] On the other hand, it is your exclusive function to decide what the facts are. You are the sole judges of the facts. You pass upon the weight of the evidence, credibility of the witnesses and you determine the reasonable inferences to be drawn from the conflicting evidence as there may be in this case.

In your determination of the facts, you should rely solely upon your recollection of the facts and of the evidence. What I may say from time to time in this charge or what the counsel may have said as to what the facts are is not to be taken in place of your recollection of the evidence in this case. No comments by me or by counsel are evidence. You are to draw no inferences whatsoever from them.

During the course of this trial naturally I was required to pass upon certain questions concerning the admissibility of evidence and upon motions made by counsel. You are to draw no inferences from my rulings with respect to the admission or rejection of evidence or the motions made by the parties. Such rulings solely related to matters of law and they are of no concern to you as triers of the fact.

Neither are you to be concerned by questions asked by me or the fact that I asked questions. These [163] questions were asked solely to elicit or clarify the evidence. The facts at issue.

Nothing I said is to be construed to indicate what your determination should be except, of course, I do expect that you will follow these instructions as to the law.

I believe that there were a few answers by witnesses either made voluntarily or in response to a question and I said "That's stricken."

I now ask you to take out your mental erasers and just remove that from your mind. You must ignore it. Those things form no part of the evidence and may not be considered by you in determining your verdict.

Of course, statements made by counsel in their openings and in their summations, they are not evidence. The evidence came from testimony of the witnesses and the exhibits marked in evidence.

You should consider, of course, both the direct examination and the cross examination. You are to approach your duties cooly, calmly and without emotion.

You may draw certain inferences from the testimony, but no verdict is to be based upon mere speculation or conjecture.

In this case both direct and circumstantial [164] evidence was produced.

Let me explain what the terms mean.

Direct evidence is where a witness saw an act which he testifies to as to what he saw and what he heard, what he discovered, what he knows of his own senses.

Charge of the Court

Circumstantial evidence is that evidence which tends to prove a fact by proof of other facts or a chain of evidence which has a legitimate tendency to lead the mind to the conclusion that facts exist which are sought to be established.

Let me give you an example. Let's assume that when you went to the courthouse this morning it was a beautiful day out and it sure was. The sun was shining brightly.

Now, pretend with me for the moment that I have had all of the windows blacked over so that you cannot see out. Let us say then that somebody walks into the courtroom with a raincoat and it is dripping wet. Shortly thereafter, somebody else walks into the courtroom with an umbrella and after he or she puts down the umbrella, you can see the pool of water collecting under it.

Now, if you were asked whether it was raining out, you couldn't tell directly by your senses because you couldn't see out those blacked-out windows. You knew when [165] you entered the building in the morning, or after lunch, it was a beautiful day. But would it be reasonable and logical for you, after seeing these two people, to conclude that it was now raining? That is all there is to circumstantial evidence. It is a kind of fact which leads you with a legitimate tendency to the finding of another fact.

The law makes no distinction whatsoever between the weight to be given to either direct or circumstantial evidence. Both are to be considered by you in reaching a verdict.

We begin here with a fundamental principle. The plaintiff having made the charge, having made the complaint, has the burden of proving the material allegations of the complaint by a fair preponderance of the credible evidence.

The term "fair preponderance of the credible evidence" means the greater weight of the evidence. It refers to the quality of the evidence rather than the number of witnesses. It means that the testimony on the part of a party, here the plaintiff, and the witnesses he produced, since the burden rests on him, must have more convincing weight than the evidence opposed to it.

You may say that a fact is proved by a fair preponderance of the evidence when all of the credible evidence tends to persuade you to believe the truth of [166] that fact.

If you find that the credible evidence is evenly divided between the parties, then you must find on the particular points against the party who has the burden of proof, here the plaintiff.

In this case, if after considering all the evidence, you find that it preponderates in favor of the plaintiff, then he has sustained the burden of proving his case by a fair preponderance of the evidence.

If it is evenly balanced, then the plaintiff has failed to sustain his burden.

Of course, if the evidence is in favor of the defendant, then the plaintiff has also failed to sustain that burden and he cannot recover.

The defendant has no obligation in law to come forward with any evidence. Whether it did or not, if plaintiff has failed to sustain his burden of proof by the fair preponderance of the credible evidence, the defendant should be entitled to a verdict.

The mere fact that an accident, an allleged injury occurred, does not entitle it to a verdict against the defen-

dant. Liability follows not from the injury or from the happening of an accident, but from the breach of some duty owed by the defendant to the plaintiff. In this [167] place the plaintiff, Cosmo Ruggiero, claims he was injured on April 17, 1970, while working in the lower hold of hatch number 2 on the motor vessel Partenon, a vessel owned by the defendant, The Royal Netherlands Steamship Company.

As you most probably can tell from its name, this defendant is a corporation. Obviously, a corporation can act only through its officers, employees or agents, and, consequently, any act or omission by an agent or employee of the corporation, if it is done within the scope of his employment, is held to be an act of a corporation and the corporation will be responsible.

In trying to hold the defendant steamship company liable, Cosmo Ruggiero, plaintiff, brought this action on two separate legal theories. One is negligence, the other one is unseaworthiness. They are two separate claims and I will discuss them separately.

As I said, the first claim is negligence. In simple terms negligence is doing an act, some act, which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do under all the circumstances, of course, in the given case.

It is the failure to use ordinary and reasonable care under a given set of circumstances.

The ship owner can be liable for negligence [168] when the owners knowingly or carelessly breaches any duty to the plaintiff. Among the duties which a ship owner has

to a longshoreman is the duty to furnish him with a reasonably fair safe place to work and perform his duties.

In order for the plaintiff to establish negligence, he must prove by a fair preponderance of the credible evidence, first, that there existed a hazardous condition with respect to here the greasy or oily substances on the plywood in the lower hold of the number 2 hatch.

Second, that the defendant had notice, either actual or constructive, of the unsafe condition prior to the plaintiff's accident.

Third, that the defendant did not warn the plaintiff concerning the alleged dangerous condition or take any steps to correct it.

Fourth, that the unsafe condition was the proximate cause in whole or in part of the injuries sustained by the plaintiff.

I think it might be helpful if I define some of those terms that I have just used. The term "actual notice" means that the defendant or its agents actually knew of the unsafe condition.

The term "constructive notice" means that the unsafe condition, allegedly unsafe condition, existed for a [169] sufficient period prior to the accident and was such that the defendant, its agents or employees, should have known about it.

Now, the defendant shipping company, The Royal Netherlands Steamship Company, is not an insurer for the safety of a longshoreman. It is not obligated to furnish a longshoreman with an accident-proof ship.

The standard here is the exercise of reasonable or due care under normal circumstances.

On the other hand, a longshoreman must exercise reasonable care in performing his duties aboard a vessel and a ship owner is not obligated to instruct an experienced longshoreman in the performance of a routine job.

In exercising reasonable care for his own safety, a long shoreman is under a duty to make use of his faculties and senses, to observe and avoid danger or injury to himself.

If a longshoreman is injured in one of the normal hazards of his calling without fault of anybody else, the ship being seaworthy, then he must bear the loss himself.

However, a longshoreman does not assume the risk arising in whole or in part from any negligence of the owner of a vessel.

As I said, the defendant steamship line has a continuing duty to see to the safety and care and to [170] exercise reasonable care for the safety of the longshoremen working on the vessel.

Another term I used was "proximate cause." An injury or damage is proximately caused by an act or failure to act whenever it appears from a preponderance of the credible evidence that the act or omission played any part, no matter how small, in bringing about or actually causing the injury.

In this case the defense has been interposed of contributory negligence. To sustain such defense, defendant has the burden of proving that plaintiff's injuries were brought about by reason of the plaintiff's own negligence.

Contributory negligence is the doing of some act or omission by the plaintiff amounting to the want of ordinary care for his own safety. It is negligence on the part of the person injured which, perhaps cooperating with some other

negligence, if it be present, helped in proximately causing his injury.

In this type of case, however, contributory negligence does not necessarily bar a recovery. If there was such negligence and if it is established to your satisfaction, it is a factor to be considered by way of a percentage of mitigation, lessening, diminution of whatever damages the plaintiff might be entitled to should you [171] determine that he is entitled to any recovery.

If contributory negligence was the exclusive cause of any injury to the plaintiff, then plaintiff is entitled to recover nothing.

You are not to be worried or concerned about determining contributory negligence until such time as you have first found that the defendant was negligent and that it was the proximate cause of the plaintiff's injury as I have already instructed you.

Now, let's turn to the second claim which involves the doctrine of unseaworthiness.

By the way, plaintiff does not have to prove both negligence and unseaworthiness. It is sufficient if he proves either negligence, as I defined it, or unseaworthiness, which I will attempt to explain to you now. The two are separate claims, but for the same injury.

With respect to the claim of unseaworthiness, the owner of a vessel has an absolute duty to provide a seaworthy vessel. That means that a shipping company is obligated to furnish and maintain safe working conditions.

Seaworthiness is the reasonable fitness for an intended purpose of a ship and its equipment.

Charge of the Court

Directed to the present case it is a question as to the reasonable fitness of that portion of the ship in [172] which plaintiff claims to have been injured.

A breach of the warranty of seaworthiness is not excused by the fact that the ship owner did not know of the unseaworthy condition, nor is it excused by the fact that the ship owner exercised reasonable care in attempting to keep his ship and the equipment there in a seaworthy condition.

You will notice that unseaworthiness and the doctrine thereof is quite different from negligence in that unseaworthiness can exist despite the exercise of reasonable care and foreseeability plays no part in the entire area.

To be seaworthy in general a vessel must be strong, staunch and properly equipped with reasonably safe gear, equipment and machinery and provided with competent crewmen, let us say, to a longshoreman worthy of his calling.

However, the mere fact that a longshoreman is injured does not mean that his place of work was unsafe or that his working conditions were not proper. The standards of seaworthiness is not perfection. It is reasonable fitness.

The question as to the claim of unseaworthiness is whether or not the ship was reasonably as fit for service as other vessels in similar service. Remember, the standard is reasonable fitness and the plaintiff must [173] have proved to you by a fair preponderance of the evidence that this standard was not maintained.

Once again, we get into the question of proximate cause. If you find that an unseaworthy condition existed, this provides no basis for liability unless you are persuaded

that such unseaworthiness was the proximate cause in whole or in part of the injuries complained of.

Now, I mentioned to you before there has been interposed by the defendant the defense of contributory negligence. This defense is equally applicable to the question or to the claim of unseaworthiness. If the defendant proved that plaintiff was contributorily negligent, that is a factor to be considered by you by way of a percentage in mitigation or lessening or diminution of any damages to which you might find he is entitled, if you find that he is entitled to a recovery.

Of course, if contributory negligence was the sole cause of the injury, then the plaintiff is entitled to recover nothing.

Let me take up as the next question the question of damages. First let me caution you. You are not to take my instructions on the question of damages as indicating in any way whether or not to what extent damages should be awarded.

[174] You are, of course, to consider my instructions on damages only if you decide that the defendant, The Royal Netherlands Steamship Company, is liable to the plaintiff.

Cosmo Ruggiero claims that he is entitled to three basic categories of damages:

One, the loss of earnings.

Two, pain, suffering and disability.

Three, medical expenses.

With respect to the first category of damages, the loss of earnings, if you should find that the plaintiff is entitled to a verdict, in arriving at the amount of any award, you should include the reasonable value of the time, if any,

shown by the evidence in the case to have been necessarily lost by the plaintiff because of his injury.

In determining this amount you should consider plaintiff's earning capacity in the manner in which he was ordinarily occupied.

I believe that the plaintiff claims that the time lost from work was eleven weeks, but, again, it is not my recollection of the evidence that controls, ladies and gentlemen, it is yours.

Second category, a claim for pain and suffering. Plaintiff is entitled upon satisfactory proof to recover a sum which will justly and fairly compensate him for any [175] conscious pain, suffering and disability which was proximately caused by the alleged negligence or unseaworthiness of the defendant.

In considering this you can compensate him for any past pain and suffering and disability that he has already suffered and which was proximately caused by this claimed negligence or unseaworthiness and you can compensate him if you believe he is reasonably certain to suffer such pain and suffering in the future from the same cause.

If you find that plaintiff's disability to be permanent, you may make allowance in your verdict as you may think the circumstances warrant taking into consideration the period of time that has elapsed from the date of the injury to the present time and the period of time that the plaintiff can be expected to live from this date forward.

In this connection you noted this morning, I'm sure, that I took judicial notice of certain mortality tables. According to them, the plaintiff has a life expectancy of 25.9 years. Such tables, however, are merely statistical averages. They neither assure the time of life given to you nor do they

assure that the span of life may not be substantially greater. The life expectancy figure I have given to you is not binding upon you. It must be considered by you in connection with your own experience and [176] in connection with the evidence you heard concerning the condition of the plaintiff's health, his habits, his activities, and so on.

The third category of damages covers medical expenses. There was testimony from a doctor here as to the usual price per doctor visit. I believe he suggested it was $25 for the first visit and approximately $7.50 for each subsequent visit. But again, it is your recollection of the testimony that is binding, not mine.

The area of damages, if you find that the plaintiff is entitled to recover, the defendant must respond to all damages flowing from the natural consequences of its breach of duty to the plaintiff, but those damages cannot be remote, speculative or conjectural. Your verdict must be based upon the facts in this case, determined without bias or sympathy either way.

Damages are intended to be purely compensatory. They are not to be inadequate nor expensive. They must be justly and fairly arrived at and they must bear a direct relationship to the harm, if you find any harm was done, which the plaintiff may have suffered.

You cannot, for example, fix an award to punish someone, to warn others. As I said, damages are purely compensatory.

[177] You paid very close attention to the evidence as it came in. That is what you are to base your verdict on.

Remember, it is your recollection that counts. If I have mentioned certain things and failed to mention others, there is no intent on my part to either minimize or empha-

size anything. It is your duty to consider all the testimony given by all the witnesess.

If per chance I have said something which does not accord with your recollection, you are to have absolutely no hesitancy to ignore any such reference by me. You are to rely upon your own recollection.

No statement I might have made is intended in any way to influence your judgment. You are the sole and only judges of the credibility of the witnesses and of the ultimate facts.

How do you determine credibility? That is a word that got mentioned a number of times.

I started off this trial by telling you that you are to use your common sense. You saw the witnesses on the stand. You observed the manner of their testimony.

Ask yourselves:

How did this witness or that witness impress me?

Did he appear to be candid, frank?

[178] What degree of believability should you give a witness' testimony?

That is up to you. It is up to you to determine by his own conduct, the manner of his testimony, his relationship, his interest in the outcome of this case and on all of those things, to use your common sense and see who you believe.

I mentioned "interest." Of course you take into consideration whether a witness has an interest in the case. But that is merely one of the factors which you should consider.

Just because a witness has an interest does not mean he is unworthy of belief. It is one of the factors that you must consider in determining the weight and credibility to be given to that witness' testimony.

We also heard from a doctor. That is so called expert testimony. In considering expert testimony, you are to give it exactly the same weight, the same tests and everything else that you do in determining whether you believe other testimony in the case.

You are to use your common sense. Many times throughout your life you are called upon to make an important decision. That is what you are to do today and you are to do it exactly as if this decision was to directly affect your life.

[179] You came into the jury box without any preconceived views, ideas, opinions, concerning the rights of either party. What you know now about the case you heard from the evidence, from the witnesses and your determination in this case is to be based only on such evidence.

Each of you is entitled to your own opinion, but I expect that once you go back to the jury room that you will deliberate, discuss and consider the evidence so as to listen to the reasoning of your fellow jurors, and reach an agreement solely on the evidence, but without doing violence to your individual judgment.

There will be six jurors who actually will deliberate to reach a verdict on this case. All six of you must agree. The verdict must be unanimous.

The parties, as I have said, and I have tried to impress upon you are entitled to even-handed justice. They stand equally before you. Sympathy, bias or prejudice play no part and should play no part in your determination. Your duty is to try this case fairly and impartially.

Shortly you will go to the jury room and begin deliberations. If you want any of the exhibits, they will be given to you.

If you want any of the testimony read back to you, it will be read back to you.

[180] If you have any requests for such things, please, the marshal will be right outside the door, hand him a note and then I will get it.

In concluding, once again let me remind you, handle this case as an important matter. Decide it totally on the evidence and the law as I have instructed you.

* * * * *

[181] * * * * *

Mr. Kimball: I respectfully except to your Honor's failure to charge the substantial substance of defendant's requests number 6, 7, 11—

The Court: Let me get it.

Yes, 6, 7.

Mr. Kimball: 11, 18 through and including 27.

The Court: Yes, all right.

Mr. Kimball: 30, 31.

The Court: Yes. Is that it?

Mr. Kimball: And 52.

The Court: Okay.

Exceptions are noted. The requests for further instructions are denied.

* * * * *

[184] * * * * *

The Court: Ladies and gentlemen, I understand that you have agreed upon a verdict, is that correct?

The Forelady: Yes.

The Court: All right, poll the jury, please.

(Roll called, all jurors present.)

Verdict

The Clerk: Madam Forelady, have you arrived at a verdict?

The Forelady: We have, your Honor.

The Clerk: How do you find?

The Forelady: We agree on the side of the plaintiff.

The Clerk: What is the amount of your verdict?

The Forelady: The amount?

The Court: Yes. That's what I was talking to you about damages about before.

The Forelady: Didn't we have to accept the amount you gave us?

The Court: No, that is entirely up to you to determine.

The Forelady: All right.

The Court: Do you wish to retire back to the jury room and consider it? Sure, I think that's the best thing to do. [185] Marshal, will you escort the jury, please.

(The jury retired to deliberate further at 5:35 p.m.)

The Court: The record should reflect that both sides have an exception.

Mr. Auslander: An exception to what?

The Court: Because of the last go-around of the jury, but to tell you the honest to God's truth, I didn't know what else to do.

(Recess.)

(At 6 p.m. the jury announced a verdict.)

* * * * *

The Clerk: Madam Forelady, have you arrived at a verdict?

The Forelady: Yes, we agree on the amount asked for, $31,063.

* * * * *

Defendant's Requests to Charge

* * * * *

6. Any witness, including the plaintiff, may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements or given testimony which are not consistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If you believe that a witness knowingly testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. "Forms", 28 F.R.D. 424-425; "FJPI" § 72.04.

* * * * *

11. To have evidentiary weight, an expert's opinion must be based upon proven facts; therefore, unless you find that all of the assumed facts upon which an expert opinion is based and which were essential to that opinion —that all of those assumed facts were proven to be true, you cannot properly accept or rely upon that expert opinion. Herman Schwabe, Inc. v. United Shoe Machinery Corp., 2 Cir., 297 F.2d 906; Syracuse Broadcasting Corp. v. Newhouse, 2 Cir., 319 F.2d 683; Rewis v. U.S., 5 Cir., 369 F.2d 595.

* * * * *

19. To prove so-called constructive notice by defendant, plaintiff must prove the size, visibility, and length of time

the claimed grease was at the place where plaintiff claims to have slipped. Rice v. Atlantic Gulf & Pacific Co., 2 Cir., 484 F.2d 1318.

* * * * *

22. Defendant had no obligation to warn the plaintiff about any dangerous condition without proof by the plaintiff that defendant knew or should have known of the existence of the condition in sufficient time to effectively warn the plaintiff. Martin v. United Fruit Company, 2 Cir., 272 F.2d 347.

* * * * *

30. Plaintiff was not entitled to a walking surface or work area that was absolutely without any grease or oil whatsoever. Rice v. Atlantic Gulf & Pacific Co., 2 Cir., 484 F.2d 1318.

* * * * *

52. Every person, plaintiff included, has a legal obligation to mitigate his damages by making reasonable efforts to work. Robillard v. A. L. Burbank & Co., S.D.N.Y., 186 F. Supp. 193.

Judgment

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Kevin Thomas Duffy, United States District Judge, and a jury, on July 1 and 2, 1975, and the jury, having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff COSMO RUGGIERO, have judgment against defendant KONINKLIJKE NEDERLANDSCHE STOCMBOOT MAATSCHAPPIJ N.V., in the amount of $31,063.

Dated: New York, N. Y.
July 3, 1975

RAYMOND F. BURGHARDT
Clerk

Relevant Portions of Defendant's Motion Papers for Judgment Notwithstanding the Verdict

To: MESSRS. ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

SIRS:

PLEASE TAKE NOTICE that on the record, Judge's and stenographer's trial minutes, and all papers and proceedings heretofore filed and had herein, pursuant to F.R.Civ.P. 50(b)(c), 59, and 62(b), and any other applicable Federal Rule of Civil Procedure, defendant by its undersigned attorneys hereby moves the Court (Duffy, J.) for judgment for defendant notwithstanding the verdict returned herein on July 2, 1975 or, alternatively, to vacate said verdict and judgment No. 75,585 entered thereon on/about July 3, 1975 and any taxed costs added thereto, and order a new trial on separate and cumulative grounds of * * * and, without limiting the plenary nature and scope of the foregoing, that the general verdict obscures whether the jury determined that defendant was negligent or the vessel unseaworthy or both, thereby making applicable hornbook law (*Mosley* v. *Cia. Mar. Adra,* 314 F.2d 223, 226-227) that if either claim was improperly submitted for jury determination there must be a new trial, and that defendant's motion for a directed verdict dismissing the negligence claim for insufficient evidence of notice prior to plaintiff's claimed accident was erroneously denied and said claim was improperly submitted to the jury, * * * and that the jury misconceived the case and failed to abide the Court's

charge, as manifested by its initial verdict of liability without awarding damages because the jury mistakenly thought it "had to accept your figure", and 9 minutes later reporting that it had a verdict, later announced as $31,063 which is exactly the amount requested by plaintiff's counsel during his summation, and that there was insufficient evidence that plaintiff slipped on grease or oil, his testimony being that sometime after and away from the site of the accident, he noticed grease or oil on the sole of his shoe (*cf., Wiseman* v. *Sinclair Refining Co.,* 290 F.2d 818), and that the verdict was influenced by and is notwithstanding plaintiff's incredible testimony that he signed a blank timekeeper's accident report (Ex. A) containing an accident version contrary to plaintiff's claim, which contrary version also appears in the treating physician's initial report (Ex. B), and * * * that the Court prejudicially refused to charge the substantial substance of defendant's requests Nos. 6 and 7 (credibility and impeachment—the essence of the case), No. 11 (erroneous factual premise negates expert's opinion—the fallacy of Dr. Campbell's testimony), Nos. 19-21 (requirement of notice and foreseeability to prove negligence —the primary deficiency of plaintiff's negligence proof), Nos. 22-27 (warning rules, necessitated by the boilerplate charge), No. 30 (the *Rice* v. *Atlantic Gulf & Pacific Co.,* 484 F.2d 1318, rule), No. 31 (pertaining to the notice/negligence questions), No. 52 (mitigation defense, particularly apposite in light of plaintiff's admission that although the treating doctor declared him fit to resume work about a month afterwards, plaintiff did not return to work for 11 weeks), and that the prejudicial impact of plaintiff's counsel's improper summation was aggravated by the Court

(*e.g.*, when defense counsel objected to plaintiff's counsel reading portions of plaintiff's deposition testimony which was not even offered in evidence, the Court brusquely and erroneously asserted that defense counsel, to whose summation plaintiff made no objection whatsoever, had committed the same impropriety), and that the jury's confusion, sympathy, prejudice, and excessiveness were partly the result of improprieties whereby the Trial Judge affirmatively established such rapport with the jurors that the Judge's patent anomosity toward defense counsel inevitably inured to the prejudicial detriment of defendant (*cf.*, American Bar Ass'n and N.Y.S. Bar Ass'n Canons of Judicial Ethics No. 21).

Order Denying Defendant's Motion

Motion denied

So ordered

KEVIN THOMAS DUFFY
U.S.D.C.

July 28, 1975

11/5/75

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